No. 17-312

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

RENE SANCHEZ-GOMEZ, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF FORMER JUDGES, FORMER PROSECUTORS, FORMER GOVERNMENT OFFICIALS, LAW PROFESSORS, AND SOCIAL SCIENTISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. The Importance of the Underlying Question Is Central to the Propriety of Appellate Jurisdiction, and this Case Centers on Critical Questions of Constitutional Law 5

II. Criminal Defendants' Constitutional Right to Be Treated with Dignity in Public Proceedings Intersects with the Public's Constitutional Interest in Observing Court Proceedings that Respect the Presumption of Innocence and the Equality of All Persons Before the Law 8

A. The Constitution Mandates that Criminal Proceedings Be Open to the Public, and the Constitution Protects How Defendants Are Treated in Courtrooms 8

B. Judges Have Constitutional and Common Law Obligations to Regulate Courtroom Conduct Both to Ensure Criminal Defendant's Due Process Rights and Article III Values of Judicial Impartiality 14

TABLE OF CONTENTS
(continued)

Page

C. All Participants Must Respect the Unique Environment of Courtrooms, and the Design of Courtrooms Makes Manifest the Public's Important Role in the Administration of Justice 17

III. Blanket Five-Point Shackling Is Incompatible with Criminal Defendants' Due Process Rights and with the Public's Interest in Observing Dignified Courtroom Processes Reflecting Those Constitutional Commitments 25

IV. Given the Centrality of this Issue to American Justice, Appellate Review Was Warranted Here 28

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Abney v. United States,
431 U.S. 651 (1977) 5, 6

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 6

Baer v. Salt Lake City Corp.,
705 F. App'x 727 (10th Cir. 2017) 15

Bank v. Katz
No. 08-CV-1033, 2009 WL 3077147
(E.D.N.Y. Sept. 24, 2009) 21

Carey v. Musladin,
549 U.S. 70 (2006) 19

Cheney v. United States Dist. Court for D.C.,
542 U.S. 367 (2004) 6, 29

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541 (1949) 5, 29

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 5

Cox v. Louisiana
379 U.S. 559 (1965) 14

Deck v. Missouri,
544 U.S. 622 (2005) ..... *passim*

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425 U.S. 501 (1976) 8

TABLE OF AUTHORITIES
(continued)

Page(s)

Globe Newspaper Co. v. Superior Court for Norfolk Cty.,
457 U.S. 596 (1982) 13

Hodge v. Talkin,
799 F.3d 1145 (D.C. Cir. 2015) 14

In re Globe Newspaper Co.,
729 F.2d 47 (1st Cir. 1984) 12

Kentucky v. Stincer,
482 U.S. 730 (1987) 26

La Rocca v. Lane,
338 N.E.2d 606 (N.Y. Ct. App. 1975) 20, 21

La Rocca v. Lane,
366 N.Y.S.2d 456 (N.Y.A.D. 1975) 21

Legal Servs. Corp. v. Velazquez,
531 U.S. 533 (2001) 11

Mitchell v. Forsyth,
472 U.S. 511 (1985) 6

Mohawk Indus., Inc. v. Carpenter,
558 U.S. 100 (2009) 5

Nestel v. Moran
513 A.2d 27 (R.I. 1986) 16

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918 F.2d 828 (9th Cir. 1990) 20

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979 N.E.2d 1187
(N.Y. Ct. App. 2012) 27

TABLE OF AUTHORITIES
(continued)

Page(s)

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912 N.E.2d 553 (N.Y. 2009) 22

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563 N.Y.S.2d 612
(N.Y. Sup. Ct. 1990) 20

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514 U.S. 211 (1995) 11

Press-Enter. Co. v. Superior Court of Cal., Riverside Cty.,
464 U.S. 501 (1984) 11, 28

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) ..... *passim*

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164 F.3d 370 (7th Cir. 1998) 14

Sell v. United States,
539 U.S. 166 (2003) 5, 6

Sheppard v. Maxwell,
384 U.S. 333 (1966) 15

Smith v. Doe,
538 U.S. 84 (2003) 9

Stack v. Boyle,
342 U.S. 1 (1951) 6

State v. Franklin,
327 S.E.2d 449 (W. Va. 1985) 20

State v. Pelletier
786 A.2d 609 (Me. 2001) 16

TABLE OF AUTHORITIES
(continued)

Page(s)

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412 F.2d 848 (7th Cir. 1969) 16

United States v. Abascal
509 F.2d 752 (9th Cir. 1975) 16

United States v. Abuhamra,
389 F.3d 309 (2d Cir. 2004) 12

United States v. Chagra,
701 F.2d 354 (5th Cir. 1983) 12

United States v. Durham,
287 F.3d 1297 (11th Cir. 2002) 22

United States v. Peoples
698 F.3d 185 (4th Cir. 2012) 16

United States v. Simone,
14 F.3d 833 (3d Cir. 1994) 12

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467 U.S. 39 (1984) 10, 11, 13

Woods v. Dugger
923 F.2d 1454 (11th Cir. 1991) 20

STATUTES

18 U.S.C. § 401 16

28 U.S.C. § 636 16

40 U.S.C. § 6135 18

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

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Insitutes of the Laws of England 34
(1797) 27

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Draught for the Organization of Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the Same,
THE WORKS OF JEREMY BENTHAM 305
(John Bowring ed., 1838–1843) 10, 11

Justice Stephen G. Breyer,
Foreword to
CELEBRATING THE COURTHOUSE
(Steven Flanders ed., 2006) 10, 12, 17

Canon City Municipal Court,
Courtroom Dress and Attire 19

Circuit Court of Illinois,
Eight Judicial Circuit,
Uniform Rules of Practice 1.11 18

Code of Conduct for the Public,
D.C. COURTS 19

Code of Conduct for U.S. Judges,
Canon 3 15

Courtroom Etiquette and Attire,
WASHTENAW CTY. TRIAL CT. 19

TABLE OF AUTHORITIES
(continued)

Page(s)

FAQs—Visiting the Court,
SUPREME COURT OF THE
UNITED STATES 18

Fed. R. Crim. P. 10 12

Financial Services and General Government Appropriations for 2016: Hearing Before the Subcomm. on Fin. Servs.,
114th Cong. 109 (2015) 23

Jona Goldschmidt,
"Order in the Court!" Constitutional Issues in the Law of Courtroom Decorum,
31 HAMLINE L. REV. 1 (2008) 15

Judicial Conference of the United States: Committees (Chronological),
FED. JUD. CTR. 22

JUDICIAL CONFERENCE OF THE
UNITED STATES,
Portable Communication Devices in the Courthouse (2017) 22, 23

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UNITED STATES,
Report of the Proceedings of the Judicial Conference of the United States (2013) 23

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(continued)

Page(s)

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Jury Frequently Asked Questions, D.C. COURTS 20

Al Kamen, *In the Loop*, Wash. Post, Sept. 11, 2009 18

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Municipal Court Dress Code, LEE'S SUMMIT, MO. 19

TABLE OF AUTHORITIES
(continued)

Page(s)

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2010 Year-End Report on the Federal Judiciary 23

Jocelyn Simonson,
The Criminal Court Audience in a Post-Trial World,
127 HARV. L. REV. 2173 (2014) 10

The Court and Its Traditions,
SUPREME COURT OF THE UNITED STATES 17

Tom R. Tyler,
Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority,
56 DEPAUL L. REV. 661 (2007) 27

Tom R. Tyler,
WHY PEOPLE OBEY THE LAW
(2d ed. 2006) 27

U.S. COURTS,
U.S. District Courts—Criminal Defendants Terminated, by Type of Disposition and Offense—During the 12-Month Period Ending December 31, 2016,
STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 13

TABLE OF AUTHORITIES
(continued)

Page(s)

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2 VISION + VOICE: CHANGING THE COURSE OF FEDERAL ARCHITECTURE (2004) 24

U.S. GEN. SERVS. ADMIN.,
James M. Carter and Judith N. Keep US Courthouse 24

U.S. GEN. SERVS. ADMIN.,
JOHN JOSEPH MOAKLEY U.S. COURTHOUSE AND HARBOR PARK (2003) 25

U.S. GEN. SERVS. ADMIN.,
THE SITE SECURITY DESIGN GUIDE (2007) 22

Douglas P. Woodlock,
Drawing Meaning from the Heart of the Courthouse,
CELEBRATING THE COURTHOUSE (Steven Flanders ed., 2006) 15

INTEREST OF AMICI CURIAE

Amici are former judges, former prosecutors, former government officials, law professors focused on the jurisprudence of the federal courts, and social scientists expert on human perception and behavior. We write to provide this Court with our understanding of why the question of the constitutionality of blanket shackling of all criminal defendants during pretrial courtroom proceedings is so important that it fits the criteria for immediate appellate review. Post-trial appeals cannot vindicate defendants' due process rights to dignified treatment or protect the public's interest in observing criminal proceedings in which all defendants are treated as individuals and entitled to the presumption of innocence.[1]

SUMMARY OF ARGUMENT

To decide the propriety of appellate jurisdiction under either the "collateral order" rule or supervisory mandamus requires consideration of the importance of the issue presented on appeal. The underlying issue here meets that requirement.

Appellate review was sought because of the decision by the judges of the Southern District of California to accede to the U.S. Marshals Service's request that all criminal defendants appear in court during pre-trial proceedings in five-point shackles—leg and arm irons, connected with a belly chain. Whether

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[1] In accordance with Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties have consented in writing to the filing of this brief.

charged with misdemeanors or felonies and whether physically able or infirm, every criminal defendant was required to appear before magistrate and district court judges in shackled restraints.

In *Deck v. Missouri*, 544 U.S. 622 (2005), this Court held that the Constitution "forbids the use of visible shackles during the penalty phase" in a capital case. *Id.* at 624. This Court concluded that shackling in front of a jury violated the defendant's due process rights; absent specific and individualized showings of an "essential state interest," based on "physical security, escape prevention, or courtroom decorum," shackling was not permissible. *Id.* at 624, 628.

Deck focused on the impact of shackles on jurors, who, while central to criminal proceedings, are not the only persons who have a constitutionally protected role in courts. The public has a First Amendment right to watch criminal proceedings. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion). In addressing why the First Amendment protects the public's right to attend criminal trials, Chief Justice Burger discussed the centrality of "publicity" (borrowing that term from Jeremy Bentham) to our legal system. *Id.* at 569.

As Chief Justice Burger explained, the public's presence has several functions. Attendance "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system." *Id.* at 573 (citation omitted). Moreover, open courts enable the public to see and to understand that justice is done, and open courts protect the public's right to gather and disseminate information. *Id.* at 570–73.

This case is at the intersection of the due process principles of the presumption of innocence and the dignity of criminal defendants, which were central to *Deck*, and the important educative function played by open courts, which animated *Richmond Newspapers* and its progeny. Criminal defendants—unless and until adjudicated guilty—are cloaked in a presumption of innocence, and the public has a right to attend proceedings that put that precept into practice. Justice must not only be visible but also comport with these constitutional commitments

Since *Richmond Newspapers*, the Court has held that the public's First Amendment attendance rights are not limited to trials. Those rulings reflect the importance of the entire criminal justice process, from arraignment through sentencing. More than 75,000 criminal defendants had their cases resolved in federal district courts in 2016; fewer than 2000 of those dispositions were by bench or jury criminal trials. Proceedings other than trial are the core of today's federal criminal justice system.

A myriad of rules organizes the ways in which all people—judges, litigants, lawyers, jurors, witnesses, bailiffs, marshals, and the public—must behave in court. A mix of constitutional law, statues, regulations, and customs point to the same conclusion: Courtrooms are central to American law, and behavior and attire must honor this unique space.

This Court and lower courts insist that members of the audience dress appropriately, rise when judges enter the room, sit quietly, and do nothing that would distract from the solemnity of decision-making about the rights and obligations of the disputants. Moreover, significant resources have been invested in building

courthouses that welcome the public, and design guides developed by the U.S. judiciary specifically require ample public seating in courtrooms.

Blanket five-point shackling is visibly and disruptively inconsistent with these core constitutional values and practices. The government decision to stigmatize all defendants fails to give them their constitutional due as individuals and undermines public understandings of the process as even-handed. Conditioning criminal defendants' rights to be present in court on being placed in five-point shackles does not reflect the distinctive function of the courtroom as the place where all individuals are presumed innocent and equal before the law.

To be sure, maintaining security is crucial, and doing so requires assistance from the U.S. Marshals, under the guidance of the United States Judicial Conference Committee on Security. But ensuring courtroom safety has long been accomplished without daily, indiscriminate shackling of all criminal defendants in all pretrial matters. Rather, as both *Deck* and *Richmond Newspapers* direct, neither the blanket use of shackles nor the generic closing of courtrooms is permissible. The tests of *Deck* and of *Richmond Newspapers* should govern here, rather than doctrines of deference to security personnel in detention centers that, unlike courts, are not venues presumptively open to the public.

Appellate review during the pretrial stage of the proceedings was proper because the question of the constitutionality of indiscriminate shackling of all criminal defendants during the pretrial process meets all the criteria of the "collateral order doctrine" and of supervisory mandamus. The issue is not mooted by

the conviction of individual defendants, some of whom have been repeatedly shackled in San Diego federal courts.

ARGUMENT

I. The Importance of the Underlying Question Is Key to Appellate Jurisdiction, and this Case Centers on Critical Questions of Constitutional Law.

This Court's grant of certiorari focused on appealability and mootness. The Ninth Circuit panel heard the appeal under the "collateral order" doctrine; the en banc panel exercised review relying on its supervisory mandamus authority. Amici address one prong of the propriety of appellate review—the importance of the Southern District of California's policy that mandated five-point shackles for all criminal defendants in all pre-trial proceedings.

Collateral review is available only in a narrow category of cases. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), identified the need for such review. In the decades since, this Court has clarified *Cohen*'s limited application. This Court has rejected the idea that all pretrial decisions, even if they sound the "death knell" of a case, could justify interlocutory appeals. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Rather, collateral order appeals are permissible in rare instances, and generally only when holding a trial under the challenged conditions causes the very injury that gives rise to the need for appeal. *See, e.g., Abney v. United States*, 431 U.S. 651 (1977); *Sell v. United States*, 539 U.S. 166 (2003); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).

Bail is a classic example. *See Stack v. Boyle*, 342 U.S. 1 (1951). Another is whether a defendant can be forced to take medication in order to stand trial. *See Sell*, 539 U.S. 166. A third line of cases recognizes appeal as-of-right when defendants assert immunity from trial—based on double jeopardy, *see Abney*, 431 U.S. 651, or qualified or absolute immunity in the civil context, *see Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). These cases exemplify the types of issues subject to collateral appellate review: important, severable, finally decided questions generally involving constitutional rights that emerge before a final judgment and which would, in essence, be extinguished once the trial has concluded.

Shackling all criminal defendants under a district-wide policy fits squarely within these parameters. The opportunity to challenge the constitutionality of a general policy of placing criminal defendants in shackles for all pre-trial proceedings in public courts is lost if denied below and not reviewed immediately. Further, the public's interest in watching courtroom proceedings that respect criminal defendants' due process rights to individual treatment can only be vindicated when the harm imposed is alleviated, which is during pretrial proceedings.

Supervisory mandamus is the other basis for appellate jurisdiction. This Court has relied on that doctrine to permit appellate review when there is "no other adequate means to attain the relief" requested, the petitioner's right is "clear and indisputable," and "exceptional circumstances" render relief "appropriate under the circumstances." *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004).

Central to both of these doctrines of appellate jurisdiction is the importance of the underlying issue—or, in the language of supervisory mandamus, the "exceptional" nature of the circumstances. Putting all criminal defendants during pre-trial proceedings in five-point shackles as a condition of their participation in public proceedings is an "exceptional" act in American legal history.

This Court decided in *Deck v. Missouri*, 544 U.S. 622 (2005), that visibly shackling defendants before juries was impermissible, unless the state established its "essential . . . interest" in a specific individual's case. *Id.* at 624. What was not decided in *Deck* is the permissibility of shackling defendants outside the presence of the jury, during the pre-trial process before judges and the public. This Court has also decided in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), and its progeny that the First Amendment right to watch courtroom proceedings aims to enable education about and understanding of the administration of criminal justice.

Because this Court's decisions protect defendants' due process rights and the public's right to be present at trial and at related proceedings, this case brings a central and vitally important question of American justice to the fore: How will defendants be treated during pre-trial proceedings, and what will people learn about the constitutional treatment of criminal defendants when they are in U.S. courthouses?

II. Criminal Defendants' Constitutional Right to Be Treated with Dignity in Public Proceedings Intersects with the Public's Constitutional Interest in Observing Court Proceedings that Respect the Presumption of Innocence and the Equality of All Persons Before the Law.

Given that the propriety of appellate review turns in part on the importance and exceptional nature of the issues, Amici provide an overview of the bodies of law and the practices that form the principle that courtrooms are sacrosanct spaces in American law in which the rights of defendants and of the public converge.

As we detail, a host of constitutional and statutory regulations organize the format of courtroom proceedings and the contours of courthouses. Law prevents rowdy crowds from gathering outside courthouses, and law circumscribes what people can wear and how they can behave inside courtrooms. These regulations have two purposes: to protect the rights of litigants and to reflect Article III courts' commitments to the neutrality and integrity of judicial proceedings.

A. The Constitution Mandates that Criminal Proceedings Be Open to the Public, and the Constitution Protects How Defendants Are Treated in Courtrooms.

Much of the law on defendants' garb in U.S. courtrooms has focused on the impact of dress and of restraint on juries. *See, e.g.*, *Estelle v. Williams*, 425 U.S. 501 (1976); *Deck v. Missouri*, 544 U.S. 622 (2005). But jurors are not the only members of the public entitled, as a matter of constitutional right, to be present in the

courtroom and for whom the defendants' appearance matters.

When members of the public walked into the federal district court in San Diego in the fall of 2013, they were confronted with criminal defendants chained in five-point shackles. From October 2013 through November 2015, when the policy was suspended a few months after the Ninth Circuit panel decision, *see* Pet. App. 71a, the United States District Court for the Southern District of California placed all defendants in five-point shackles. That policy did not take into account the crimes charged, physical abilities, or the amount of information available about individual defendants. *See* J.A. 76–79. Defendants were shackled for pre-trial appearances and, apparently, occasionally for sentencing. *See* Pet. App. at 1a–5a; 73a–75a.

None of the individuals was assessed as to their potential to be dangerous. Rather, the four Respondents, Rene Sanchez-Gomez, Moises Patricio-Guzman, Jasmin Isabel Morales, and Mark William Ring, were forced to appear in shackles in the courtrooms of magistrate and district court judges in the James M. Carter and Judith N. Keep United States Courthouse and in the Edward J. Schwartz Federal Building and U.S. Courthouse.

When the government puts a person in shackles, it marks that person as a threat. The Constitution permits various forms of intrusion on individual liberty, despite their stigmatizing effect, but only after an individualized assessment to ensure accuracy and fairness. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84 (2003) (upholding post-conviction registries of sex offenders based on the process of factfinding and decisionmaking that undergirds them). Courtrooms, in other

words, are places where "the judicial branch of government treats each citizen before it not as a member of a group but as a separate human being." Justice Stephen G. Breyer, *Foreword* to CELEBRATING THE COURTHOUSE 9, 11 (Steven Flanders ed., 2006).

Indiscriminate shackling breaches the due process obligation to treat criminal defendants as individuals, entitled to be presumed innocent. A policy of shackling all criminal defendants likewise undermines the public's interest in observing dignified proceedings that exemplify American commitments to respect defendants' rights and the rule of law.

The public's right of access to criminal proceedings is a bedrock principle of our judicial system, founded in traditions of the common law and protected by the First Amendment, and is intertwined with defendants' rights to public proceedings. *Richmond Newspapers*, 448 U.S. at 580; *Waller v. Georgia*, 467 U.S. 39, 46 (1984); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014). This Court and lower courts have explained the history and the importance of these rights, today understood as running from arraignment and bail to probable cause, preliminary hearings, *voir dire*, sentencing, and post-trial hearings.

The openness of courts has many utilities, but as Chief Justice Burger concluded, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers*, 448 U.S. at 575. The constitutional guarantee of open courts reflected what Jeremy Bentham called "publicity," *id.* at 569, which Bentham termed the "soul of justice," *see* 4 JEREMY BENTHAM, *Draught*

for the Organization of Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the Same, in THE WORKS OF JEREMY BENTHAM 305, 316 (John Bowring ed., 1838–1843).

As Bentham explained, courts are schools for justice, *id.* at 317, teaching that law treats everyone as equals and assesses individual claims on their merits. As this Court put it, the inclusion of the public provides a form of "legal education" that "'hopefully promotes confidence in the fair administration of justice.'" *Richmond Newspapers*, 448 U.S. at 572 (citation omitted).

This educative function is not limited to trials. Indeed, "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." *Press-Enter. Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 505 (1984). Whether at *voir* dire, suppression hearings, or other proceedings, the goal is for the public to see a defendant who "is fairly dealt with and not unjustly condemned." *Waller*, 467 U.S. at 46 (citing T. Cooley, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927)).

In addition to the law on public access, the integrity of judicial proceedings has been protected by this Court's insistence that the "judicial Department" be protected from encroachment that would diminish its authority. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226–27 (1995). And, in so doing, the Court has emphasized the importance of presenting the values of judicial integrity to the public. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545–46 (2001) (finding that a restriction on lawyers violated

separation-of-powers principles and the First Amendment when it would lead "[t]he courts and the public . . . to question the adequacy and fairness" of the judicial process). In short, as Justice Breyer has explained, courthouses belong "not just to the judges or courts or lawyers but to the public as well." Breyer, Foreword to CELEBRATING THE COURTHOUSE at 9.

These entwined themes—the obligations of the criminal justice system to treat criminal defendants fairly, public rights to attend, the importance of courthouses in American law, and the integrity of Article III courts—undergird a host of public access provisions. Federal Rule of Criminal Procedure 10(a) requires that arraignments "be conducted in open court." Bail hearings must likewise be open, for the "'contemporaneous review' of criminal prosecutions 'in the forum of public opinion' serves as an important restraint on abuse of government power." *United States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)). *Accord In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir. 1984); *United States v. Chagra*, 701 F.2d 354, 362 (5th Cir. 1983). As Judge Frank Coffin stated in *Globe Newspaper*, public access to bail hearings serves "the need for a public educated in the workings of the justice system and for a justice system subjected to the scrutiny of the public." 729 F.2d at 52. After trial, the public is permitted to observe post-trial hearings investigating jury misconduct. *See United States v. Simone*, 14 F.3d 833, 839 (3d Cir. 1994).

This jurisprudence reflects the centrality of non-jury, non-trial proceedings in today's federal courts. In 2016, 76,891 criminal defendants had their cases disposed of in U.S. district courts; 161 defendants were

convicted by bench trials, and 66 acquitted; 1,510 defendants were convicted by juries, and 203 acquitted. *See* U.S. COURTS, *U.S. District Courts—Criminal Defendants Terminated, by Type of Disposition and Offense—During the 12-Month Period Ending December 31, 2016*, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY D-4 at 1, http://www.uscourts.gov/sites/default/files/data_tables/stfj_d4_1231.2016.pdf. The total number of trials—bench and jury—represented 2.5 percent of the dispositions. *Id.*

Of course, the public's right of access to court proceedings is not unlimited. But any restriction on that right must be justified by an individualized analysis—against a baseline presumption that the public must be allowed to be present. Under the First Amendment framework, denial of the public's right of access must be necessitated by a compelling governmental interest, and such denial must be narrowly tailored to serve that interest. *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 606 (1982). The Sixth Amendment standard is similar: The party that seeks "to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Waller*, 467 U.S. at 48.

B. Judges Have Constitutional and Common Law Obligations to Regulate Courthouse and Courtroom Conduct to Ensure Criminal Defendants' Rights to Due Process and Article III Values of Judicial Impartiality.

Preserving the dignity and decorum of the judicial process sometimes requires judges to take measures to police conduct. "Newspapers and the streets outside are open to scathing criticism of what happens within the courthouse . . . . But the halls of justice may be kept hushed." *Sefick v. Gardner*, 164 F.3d 370, 373 (7th Cir. 1998).

Indeed, the special status of the courthouse extends beyond its front door. In *Cox v. Louisiana* this Court explained that "it is of the utmost importance that the administration of justice be absolutely fair and orderly" given that "the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy." 379 U.S. 559, 562, 564 (1965). In that case, the Court upheld an ordinance prohibiting picketing near a courthouse. *Id.* at 562; *see also, e.g., Hodge v. Talkin*, 799 F.3d 1145, 1150 (D.C. Cir. 2015) (upholding prohibition against assemblage and display of signs on Supreme Court grounds in light of "the government's long-recognized interests in preserving decorum in the area of a courthouse and in assuring the appearance (and actuality) of a judiciary uninfluenced by public opinion and pressure"). Courthouse lobbies are likewise special places, where rules of conduct are enforced. "Courts seek to induce in the jurors, witnesses, and litigants who pass through the lobby on the way to the courtrooms a serious cast of mind." *Sefick*, 164 F.3d at 373.

The courtroom is "the heart and soul of the courthouse." Douglas P. Woodlock, *Drawing Meaning from the Heart of the Courthouse*, in CELEBRATING THE COURTHOUSE, *supra*, at 155, 167. And judges are at the helm, ensuring that behavior befits the solemnity of the judicial process. After all, "the 'very purpose of a court system . . . [is] to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.'" *Sheppard v. Maxwell*, 384 U.S. 333, 350–51 (1966) (quoting *Cox*, 379 U.S. at 583).

To that end, as the Code of Conduct for United States Judges explains, federal judges "should maintain order and decorum in all judicial proceedings.'" Code of Conduct for U.S. Judges, Canon 3 (A)(2), http://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf. The obligation to protect courtroom decorum applies to judges and magistrate judges alike. *See, e.g.*, *Baer v. Salt Lake City Corp.*, 705 F. App'x 727, 732 (10th Cir. 2017). That decorum in turn helps to "maintain public trust and confidence in the courts and the rule of law, generally." Jona Goldschmidt, *"Order in the Court!" Constitutional Issues in the Law of Courtroom Decorum*, 31 HAMLINE L. REV. 1, 9 (2008). Appellate courts likewise are required to ensure decorum, making it proper in cases such as this to exercise supervisory mandamus authority.

In individual cases, judges have used contempt sanctions to preserve "judicial serenity and calm," *Sheppard*, 384 U.S. at 355. Conduct of individuals—whether litigants, lawyers, witnesses, court personnel, jurors, or members of the audience—can be the

grounds for contempt. Both district judges and magistrate judges have authority to impose contempt sanctions. *See* 18 U.S.C. § 401; 28 U.S.C. § 636(e).

When judges perceive a threat to the public's experience of courtroom justice, individualized assessments are made in order to preserve the dignity and decorum of the courtroom. For example, in *United States v. Abascal*, the Ninth Circuit affirmed a contempt conviction where the appellant refused to step forward and remained slouched in his chair while the court addressed him. 509 F.2d 752, 754 (9th Cir. 1975). The "ability of a trial judge to compel obedience to his orders," the court noted, "is fundamental to the proper functioning of our system of justice." *Id.* Individuals' refusal to stand when judges leave or enter courtrooms has likewise drawn sanctions. *U.S. ex rel. Robson v. Malone*, 412 F.2d 848 (7th Cir. 1969).

Other kinds of conduct have also prompted the imposition of contempt sanctions. In *State v. Pelletier*, for example, the court noticed a vulgar phrase on the back of a criminal defendant's t-shirt only after the conclusion of arraignment proceedings. 786 A.2d 609, 610–11 (Me. 2001). The judge emphasized the many spectators who must have seen the vulgar language and judged him to be in contempt. *Id.* In *Nestel v. Moran*, the court affirmed a contempt conviction where protestors stood and turned their backs to the judge during sentencing. 513 A.2d 27, 29 (R.I. 1986). And in *United States v. Peoples*, the court upheld a contempt conviction for vulgar language that was directed at a judge. *See* 698 F.3d 185, 190 (4th Cir. 2012).

C. Participants Must Respect the Unique Environment of Courtrooms, and the Design of Courtrooms Makes Manifest the Public's Important Role in the Administration of Justice.

Core Article III and due process values govern what happens inside courtrooms to ensure that judges are impartial, that every party is treated with respect, and that the judicial process proceeds in a solemn and respectful manner. The key element is not the presence of jurors but the preservation of the meaning of the courtroom, which "is the home of the *law*." Breyer, Foreword to CELEBRATING THE COURTHOUSE, *supra*, at 11.

Longstanding tradition, current custom, and this Court's jurisprudence confirm that what a judicial proceeding looks like matters. Justice must appear fair, and justice must be fair. From the details of the dress of the participants to the way in which individuals comport themselves, the presence of U.S. Marshals and of the U.S. flag to the protection of the buildings and sidewalks of courthouses, the law makes plain the importance of what transpires inside courtrooms. Presenting all defendants in shackles violates this fabric of both doctrine and rules.

That courtrooms are regulated spaces is a familiar precept in this Court. In the late 1890s, future senator George Wharton Pepper arrived to argue wearing a grey coat. The Court refused to let him enter until he borrowed a more formal morning coat. *The Court and Its Traditions*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/traditions.aspx (last visited Feb. 26, 2018).

Although morning coats are no longer the measure of respectful attire, the dress of individuals continues to reflect the significance of what transpires.[2] In this Court, "[s]unglasses, identification tags (other than military), display buttons, and inappropriate clothing may not be worn in the Courtroom when Court is in session." *FAQs—Visiting the Court*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/faq_visiting.aspx (last visited Feb. 26, 2018). The grounds of this Court are likewise protected from inappropriate activities. *See e.g.*, 40 U.S.C. § 6135 (preventing the display of "a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement" in the Supreme Court's building or grounds).

Judges, of course, take care to dress in a way that preserves the dignity and decorum of the courtroom. [3] The robes that judges don when presiding before the public signify their special role in American life and help mark the space of a courtroom as unique. Other court personnel—including bailiffs and marshals—likewise dress in a manner that befits the solemnity of the judicial process. These standards communicate to the public the gravity of the proceedings.

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[2] Less than ten years ago, it made news when Justice Kagan, while serving as Solicitor General, appeared before the Court in a dark suit rather than in a morning coat. Al Kamen, *In the Loop*, Wash. Post, Sept. 11, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/09/10/AR2009091004250.html?sub=AR (last visited Feb. 26, 2018).

[3] In some jurisdictions, the custom of judicial robes is codified in formal rules. *See , e.g.*, Circuit Court of Illinois, Eighth Judicial Circuit, Uniform Rules of Practice 1.11(a).

Both the participants in and the observers of judicial proceedings must stand when judges enter the room and must dress in a manner that befits the dignity of the courtroom. As Justice Souter explained, judges have an "affirmative obligation to control the courtroom and keep it free of improper influence." *Carey v. Musladin*, 549 U.S. 70, 82 (2006) (Souter, J., concurring). Consistent with that obligation, Justice Souter concluded, "allowing spectators at a criminal trial to wear visible buttons with the victim's photo can raise a risk of improper considerations." *Id.* Indeed, courts around the country commonly prohibit clothing that is provocative.[4] Court dress codes ban tank tops; shorts; baggy pants; hats not worn for religious purposes";[5] "heavily soiled work clothing";[6] and "theatrical costumes." [7] Rules also direct the dress of jurors; for example, the District of Columbia Courts

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[4] *Code of Conduct for the Public*, D.C. COURTS, https://www.dccourts.gov/sites/default/files/divisionspdfs/Public-Code-of-Conduct.pdf (last visited Feb. 26, 2018).

[5] *Courtroom Etiquette and Attire*, WASHTENAW CTY. TRIAL CT., http://washtenawtrialcourt.org/general/courtroom_etiquette-attire (Michigan trial court); *see also* Canon City Municipal Court, Courtroom Dress and Attire, *available at* http://www.canoncity.org/departments/courtroom_etiquette.php (Colorado municipal court) (last visited Feb. 26, 2018).

[6] *Municipal Court Dress Code*, LEE'S SUMMIT, MO., http://cityofls.net/Municipal-Court/Court-Process/Dress-Code (last visited Feb. 26, 2018).

[7] *Id.*

expect jurors to respect "the formality of the court proceedings" by avoiding jeans, t-shirts, shorts, athletic wear, and hats.[8]

When inappropriate attire undermines the integrity of a judicial proceeding, courts have concluded that outcomes cannot stand. In *Norris v. Risley*, for example, the Ninth Circuit reversed a conviction for kidnapping and sexual assault when spectators wore "Women Against Rape" buttons during trial. 918 F.2d 828, 832–34 (9th Cir. 1990). Similarly, in *Woods v. Dugger*, the Eleventh Circuit reversed a conviction for murder of a prison staff member in part because, at trial, members of the public appeared in the uniform used by prison staff. 923 F.2d 1454 (11th Cir. 1991); *see also State v. Franklin*, 327 S.E.2d 449, 454–55 (W. Va. 1985) (reversing a conviction related to driving under the influence of alcohol because audience members wore Mothers Against Drunk Driving buttons during the trial); *People v. Pennisi*, 563 N.Y.S.2d 612, 616 (N.Y. Sup. Ct. 1990) (prohibiting a victim's family and supporters from wearing corsages during criminal trial, finding that doing so could "constitute conduct disruptive of a courtroom environment, which environment must be scrupulously dedicated to the appearance as well as the reality of fairness and equal treatment").

Courts have also recognized that religious garb may, in some circumstances, undermine the neutrality of judicial proceedings. In *La Rocca v. Lane*, for example, the New York courts held that an attorney's

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[8] *Jury Frequently Asked Questions*, D.C. COURTS, http://www.dcd.uscourts.gov/sites/dcd/files/jury-FAQ.pdf (last visited Feb 26, 2018).

religious right to wear a clerical collar was outweighed by the need to ensure a fair trial. 338 N.E.2d 606, 613 (N.Y. Ct. App. 1975). A fair trial, the court emphasized, "includes the atmosphere and the appearance of a fair trial." *La Rocca v. Lane*, 366 N.Y.S.2d 456, 464 (N.Y.A.D. 1975). In this and other cases, "courts have expressed a concern for the potential prejudice that might result if an attorney or witness is allowed to dress in religious garb." Samuel J. Levine, *Religious Symbols and Religious Garb in the Courtroom: Personal Values and Public Judgments*, 66 FORDHAM L. REV. 1505, 1524 (1998).

Concern for the dignity and decorum of courtrooms—and respect for Article III values reflected therein—is not limited to times when judges preside at jury trials. In *Bank v. Katz*, for example, a lawyer filed a federal lawsuit insisting that he had a First Amendment right to wear jeans and a baseball hat in the courtrooms of New York State. No. 08-CV-1033, 2009 WL 3077147, at *1 (E.D.N.Y. Sept. 24, 2009). The court rejected that First Amendment claim and held that the state's restriction was "reasonably related to the maintenance of courtroom civility and respect for the judicial process." *Id* at *2. The state judge's enforcement reflected its "obligation to maintain the dignity of judicial proceedings and to oversee courtrooms in a manner that promotes their integrity." *Id.*

Security is of course part and parcel of the dignity of courtrooms. The case law reflects that deciding whether restraints are needed requires scrutiny of specific circumstances. For example, when considering whether criminal defendants can be required to

wear stun belts during proceedings, judges have repeatedly insisted on individualized assessments of dangerousness, whether or not the garb is visible to jurors. *See, e.g.*, *United States v. Durham*, 287 F.3d 1297, 1304 (11th Cir. 2002); *People v. Buchanan*, 912 N.E.2d 553, 554 (N.Y. 2009). Whether visible or not, "stun belts plainly pose . . . a serious threat to the dignity and decorum of the courtroom." *Durham*, 287 F.3d at 1306.

These individual decisions take place against the backdrop of national efforts to secure the safety of courtrooms. The General Services Administration has guidelines on the zones within courthouse areas requiring different levels of security. *See* U.S. GEN. SERVS. ADMIN., THE SITE SECURITY DESIGN GUIDE at 21–25 (2007), https://www.gsa.gov/cdnstatic/GSA_Chapter_Two_8-8-07.pdf. The Judicial Conference of the United States has a committee on Judicial Security, distinct from its Committee on Space and Facilities, and dedicated to developing policy protecting safety. *Judicial Conference of the United States: Committees (Chronological)*, FED. JUD. CTR., https://www.fjc.gov/history/administration/judicial-conference-united-states-committees-chronological (last visited Feb. 26, 2018).

The decisionmaking processes of the Judicial Conference's Security Committee reflect the need for deliberation and collaboration to ensure balancing of the needs of all courthouse users. For example, in the context of developing guidelines on the use of cell phones in courthouses, the Conference explained, "[c]ourt security committees, which may include federal defenders and the panel attorney district representative, are well suited" to shaping appropriate rules. JUDICIAL

CONFERENCE OF THE UNITED STATES, *Portable Communication Devices in the Courthouse* 4 (2017), http://www.uscourts.gov/sites/default/files/portable_comm_devices_policy.3.12.17.pdf. Likewise, study was required before deciding whether court and chamber personnel should pass through metal detectors before entering court spaces. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, Report of the Proceedings of the Judicial Conference of the United States 21 (2013), http://www.uscourts.gov/sites/default/files/2013-03.pdf.

The national policies on security in courthouses are a subset of a broader set of decisions by the judiciary about courthouse design. In Justice Kennedy's words, federal courthouses "are a tangible, palpable, visible, clear manifestation of our commitment to the Rule of Law." *Financial Services and General Government Appropriations for 2016: Hearing Before the Subcomm. on Fin. Servs.*, 114th Cong. 109 (2015).

The U.S. Supreme Court building, completed in 1935, is an iconic exemplar. "Seventy-five years later, the Supreme Court's majestic building stands out as a familiar and iconic monument to the rule of law. The architect's use of classical elements and durable stone has aptly captured the Court's imperishable role in our system of government." Chief Justice John G. Roberts, *2010 Year-End Report on the Federal Judiciary*, at 1, https://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf.

Since Chief Justice Rehnquist recognized the critical need for courthouse construction in the 1980s, the federal judiciary has taken a leadership role in ensuring that courthouses make clear to the public our constitutional commitment to the rule of law. Doing

so entailed ensuring an architecture appropriate for federal courts, in which courtroom layout is central. *See* U.S. GEN. SERVS. ADMIN, 2 VISION + VOICE: CHANGING THE COURSE OF FEDERAL ARCHITECTURE, 5–7 (2004); VISION + VOICE: DESIGN EXCELLENCE IN FEDERAL ARCHITECTURE: BUILDING A LEGACY 33 (2002).

As the 2007 U.S. Courts Design Guide instructs, the "architecture of federal courthouses must promote respect for the tradition and purpose of the American judicial process. To this end, a courthouse . . . must express solemnity, integrity, rigor, and fairness . . . . to frame, facilitate, and mediate the encounter between the citizen and the justice system." JUDICIAL CONFERENCE OF THE UNITED STATES, U.S. COURTS DESIGN GUIDE 3-1 (2007).

Courtrooms must provide the public with insights into the "dignity of the judicial system." JUDICIAL CONFERENCE OF THE UNITED STATES, U.S. COURTS DESIGN GUIDE 91 (1991). Doing so requires ample seating for the public. The 2007 Guide provided specifications for district judge and magistrate judge courtrooms. *See* 2007 U.S. COURTS DESIGN GUIDE, *supra*, at 4-15, 24. Because "[t]he right to a public trial necessitates a certain volume of general public," the design guide instructed that seating should be available for sixty-five to eighty-five people in a district judge's courtroom. *Id.* at 4-13.

The San Diego courthouses where Respondents were shackled exemplify the public commitment to ensuring the dignity of courthouses and courtrooms. *See* U.S. GEN. SERVS. ADMIN., James M. Carter and Judith N. Keep US Courthouse, https://www.gsa.gov/about-us/regions/welcome-to-the-pacific-rim-region-9/build-

ings-and-facilities/california/james-m-carter-and-judith-n-keep-us-courthouse. The care taken in the construction of San Diego's federal district courthouse is not unusual. Another example is the John Joseph Moakley Courthouse in Boston, Massachusetts. Each of the courtrooms is decorated with four rounded arches, symbolizing that the disputants, the judge, and the public are each equally important to the legal process. That design "gives appropriate recognition to each player in the judicial process." U.S. GEN. SERVS. ADMIN, JOHN JOSEPH MOAKLEY U.S. COURTHOUSE AND HARBOR PARK 8 (2003).

III. Blanket Five-Point Shackling Is Incompatible with Criminal Defendants' Due Process Rights and with the Public's Interest in Observing Dignified Courtroom Processes Reflecting Those Constitutional Commitments.

As Amici have recounted, the Constitution requires courtrooms to be open to the public, which plays a critical role in the processes of generating legitimacy for the criminal justice system. We devote significant resources to building and maintaining courthouses because they embody a profound commitment to equal justice under law.

The layers of regulations of courtrooms rightfully reflect that what people wear and how they move weave the fabric of our legal system. To prevent a lawyer, a juror, or a spectator from wearing a badge or a t-shirt but to mandate that all criminal defendants wear chains is to undermine the individual treatment of all persons in courts, which the Constitution protects.

Criminal defendants have a right to be present at any stage of the proceeding that is "critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). But under the policy in the Southern District of California, defendants were forced either to stay out of court or to enter the halls of justice in five-point shackles—with no individualized assessment.

Shackles have a long history of marking the person bound as dangerous, as threatening, as violent, and, historically, as subjugated to others and enslaved. To require criminal defendants to walk into court by shuffling into that hall of justice with arms and legs bound, arms chained to waist, is to undermine the commitment that all persons enter with dignity. Judges, lawyers, staff, and the public who see a shackled detainee observe someone set apart and physically marked as other—and as lesser. Forcing all criminal defendants who appear for court proceedings into five-point shackles thus undermines the public's understanding that courtrooms treat all persons as individuals and respect the presumption of innocence. Blanket shackling breaches the delineation between the courtroom and the holding cells or detention centers from which defendants are brought.

Even as this case raises the question for the first time before this Court in the context of pre-trial proceedings, the common law has long recognized the damage that indiscriminate shackling does to the legitimacy of criminal justice and its public perception. Citing Bracton, Magna Carta, Virgil, and the Books of Luke and John, Coke wrote: "[A]ll the said ancient authors are against any pain, or torment to be put or inflicted upon the prisoner before attainder, nor after

attainder, but according to the judgement." 3 E. Coke, Institutes of the Laws of England 34 (1797); *see also* Joan M. Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 ST. LOUIS U.L. J. 351, 351–53 (1971). And history followed suit: As the Ninth Circuit en banc opinion chronicled, the longstanding rule in England and the United States requires an individualized determination before a defendant may be shackled in both jury and non-jury proceedings.

By stigmatizing all defendants, the government undercuts the legitimacy of the process for both the defendants and the viewing public. *See* Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 664–65 (2007); Tom R. Tyler, WHY PEOPLE OBEY THE LAW (2d ed. 2006). Shackling defendants may also cause judges—despite their best efforts—to see shackled detainees as dangerous and likely guilty. *See, e.g.*, *People v. Best*, 979 N.E.2d 1187, 1189 (N.Y. Ct. App. 2012) (holding that the trial court erred by allowing a defendant, who had not been subjected to an individualized assessment, to appear at a bench trial in shackles).

A literature on implicit bias focuses on associational stereotyping—linking, for example, age with infirmity. *See generally* Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, ANN. REV. L & SOC. SCI., 3, 427–51 (2007). But here the problem is not implicit bias but explicit labeling by the government of all criminal defendants as dangerous risks.

Amici are keenly aware of the importance of protecting every person in court proceedings. Doing so requires a cooperative effort among all participants that

is consistent with constitutional obligations. This Court announced how to balance security concerns and defendants' rights in the context of defendants appearing in shackles before juries. This Court concluded that individualized assessments of dangerousness can accomplish security goals without giving courtrooms the ambiance of detention centers. *See Deck*, 544 U.S. at 630.

A parallel principle is reflected in the law governing the public's right to be present in courtrooms, which is also not absolute. *See Press-Enter. Co.*, 464 U.S. at 509. Closing courtrooms can take place, but only based on evaluations in specific contexts and then with as narrowly tailored a limit on public access as possible.

Blanket five-point shackling, in contrast, deprived criminal defendants in San Diego of their constitutional rights by undermining their individuality and marking them all as dangerous. No less than at trial or sentencing, indiscriminate shackling at pretrial stages communicates to the public that criminal defendants are not truly individuals in the eyes of the law. Accordingly, the integrity of our judicial system requires that shackling—at any stage of proceedings—be allowed only if individual circumstances show a need based on a risk of violence or escape.

V. Given the Centrality of this Issue to American Justice, Appellate Review Was Warranted Here.

This case is at the heart of American justice, as its outcome will decide what American courtrooms look like. If no appellate review can be had, district courts may indiscriminately shackle defendants with no

oversight. A never-ending parade of defendants appearing in five-point shackles for nearly every court proceeding is anathema to the due process rights of defendants and to the dignity and decorum that are bedrock principles in American judicial proceedings.

Thus, this case meets the test of "importance" that is central to the collateral order doctrine, *see Cohen*, 337 U.S. at 546, and presents the "exceptional circumstances" required to exercise supervisory mandamus, *Cheney*, 542 U.S. at 380. To be decided is whether criminal defendants are treated as individuals and what the public sees and learns about American criminal justice by watching courtroom processes.

The harm to the public happens at the moment a defendant shuffles into court in shackles. That image of American criminal justice cannot be remedied at some later date, and it is not rendered moot by completion of any individual criminal proceeding. Immediate appellate review—through either the "collateral order" or "supervisory mandamus" framework—is therefore essential to preserving criminal defendants' rights and the dignity and decorum of the American judicial process.

CONCLUSION

For the foregoing reasons, as well as those given by Respondents and in the decisions below, the judgment of the Court of Appeals should be affirmed.

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